(2)

No. 00-1566

Supreme Court, U.S.
FILED
MAY 9 2001
OFFICE OF THE CLERK

In the
Supreme Court of the United States

LEXMARK INTERNATIONAL, INC.,

Petitioner,

v.

RONALD L. SNOWDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Charles W. Curry
109 N. Mill Street
Lexington, KY 40507
(859) 233-1426
Counsel of Record for Respondent

STATEMENT OF THE CASE

The Respondent accepts the QUESTION PRESENTED, LIST OF PARTIES, APPENDIX, TABLE OF AUTHORITIES, OPINION BELOW, JURISDICTION AND STATEMENT OF THE CASE, as stated in its Petition, with the following exceptions:

1. There was no evidence linking Snowden with any theft of SIMMS, other than that which might have been inferred on March 9, 1966, this being the only predicate act to be considered under RICO. As the opinion of the Sixth Circuit indicated at p. 6a (Petition), "Lexmark's only proof of wrongdoing is the surveillance tape of the March theft." The Court stated why there may be a genuine issue of fact as to whether the March theft was from an "interstate shipment", but that Lexmark go the benefit of the doubt since this matter was decided on summary judgment.

In referring to other alleged theft of SIMMS, the Court stated in the next paragraph: "The same cannot be said for the other alleged theft. There is simply no evidence that Mr. Snowden stole Lexmark chips in January 1996."

2. The Sixth Circuit, at p. 7a (Petition), discussing the second predicate act required by the RICO Act [18 U.S.C. 1061 (5)], summarizes the evidence of the violation of the Copyright Statute (18 U.S.C. 2319):

> ...The only connection between Lexmark and the alleged infringement is its assertion that "It is logical to infer that at least some of the stolen SIMMS were utilized as components of the illegal BBSs" [Bulletin Board Services] and, "...It is also likely that stolen

> SIMMS were sold through Snowden's BBS". (emphasis added).

Thus, the Sixth Circuit aptly summarized the proof herein, indicating Lexmark's only proof of wrongdoing was the surveillance tape of the March theft, which would have, at best, constituted a violation of 18 U.S.C. §659 (Theft from Interstate Shipment). This established only one possible predicate act under RICO.

3. The Petitioner at p. 8, top of the page, states that:

> Since Snowden was, through the theft of computer chips, already subject to the RICO penalties, his exposure for the combination of theft and the copyright infringement remain the same following the effective date of the amendment.

Respondent believes this is either a misstatement or a misunderstanding of the application of RICO. The violation of 18 U.S.C. §659 on March 9, 1996, is the only possible event constituting a predicate act under RICO. This is clear from the Sixth Circuit's Opinion. This alone is not sufficient to in any way subject him to the RICO statute, as it requires a minimum of two violations [18 U.S.C. 1961(5)].

ARGUMENT

The Sixth Circuit Opinion correctly applied Landgraf v. USI Film Products, 511 U.S. 244, 128 L.Ed.2d 229, 114 S. Ct. 1483 (1994). The Court's Opinion dealt extensively with the issue of retroactive application.

I. THE SIXTH CIRCUIT PROPERLY APPLIED THE DICTATES OF LANDGRAF, AND SUBSTANTIVE DUE PROCESS IN FINDING THAT THE AMENDMENT TO RICO WAS NOT TO BE APPLIED RETROACTIVELY.

Landgraf, supra, was very instructive and useful to the Court in making its decision. Landgraf also involved the retroactive application of an amendment to an existing statute in a Civil Rights action. Therein the Court considered the scope of the 1991 Civil Rights Act, specifically §102 providing that the complaining party might recover compensatory and punitive damages and be entitled to a jury trial. The prior law allowed "only an amount equal to the wages the employee would have earned from the date of discharge to the date of reinstatement, along with lost fringe benefits," Landgraf, supra, at p. 1491. The Plaintiff in Landgraf, at p. 1493, attempted to argue that under §402(a):

> "Except as otherwise specifically provided, the act and the amendments made by this act shall take effect upon enactment." ...[This] would be superfluous unless it referred to §402(b) and 109(c), which provided for prospective application in limited contexts.

The Plaintiff thus argued that Congress had provided for and intended for prospective application of this amendment, i.e., it did apply to pending action or conduct prior to its effective date. Thus it is analogous to the Snowden matter. The Court rejected this argument and found that Congress, considering what is arguably a stronger statement on its position on retroactivity, did not

provide that the amendment should be applied retroactively.

The Sixth Circuit analyzed Lexmark's argument, and concluded that Congress did not express its intentions on retroactivity, and thus the dictates of Landgraf, supra, and fundamental fairness (substantive due process) dictate that this amendment should not be applied retroactively. Part of the Sixth Circuit's analogy is based on Lexmark's argument and citations regarding an *ex post facto* challenge. In its Sixth Circuit Brief, p. 19, Lexmark cited United States v. Campanale, 518 F.2d 352, 365 (9th Cir., 1975), citing the Senate Judiciary Committee on this issue that:

> One act in the pattern must be engaged in after the effective date of the legislation. This avoids the prohibition against *ex post facto* laws, and bills of attainder. Anyone who is engaged in the prohibited activities before the effective date of the legislation is on prior notice that only one further act may trigger the increased penalties and new remedies of this chapter. (emphasis added).

S. Rep. No. 91-617, at 158 (1969).

Thus, the Sixth Circuit found that if such an amendment was to "reach back in the same manner as the original legislation, then they too must have the safeguard of prior notice." Sixth Circuit Opinion, p. 10a (Petition).

Thus, the Sixth Circuit properly ruled that Congress had not expressed its intention as to retroactivity of this Amendment to the RICO Act, and that application as to Snowden would violate fundamental presumptions against retroactive application, based on concepts of substantive due process or prior notice.

II. APPLICATION OF THE AMENDMENT TO SNOWDEN WOULD RESULT IN:

> Impairing rights a party possessed when he acted, increasing a party's liability for past conduct, or imposing new penalties with respect to transactions already completed.

Landgraf, supra at 1504.

Like §102, 18 U.S.C. 1964(c), provides for "Threefold" damages and attorney fees for a civil violation of §1962 of the Act. In Landgraf, the amendment providing for additional compensatory damages was found to impair the rights a party possessed when it acted, or to increase the party's liability for past conduct, or to impose new duties with respect to the transactions completed (p. 1505). The Court should find likewise for awards of treble damages and attorney fees. Contrary to the Petitioner's assertion at p. 8 of its Petition, Snowden was not already subject to RICO penalties because of the alleged theft of computer chips alone (18 U.S.C. §659). 18 U.S.C. §1961(5) requires two acts of racketeering activity, referring to those acts defined in 18 U.S.C. §1961. (emphasis added). Thus, only with the inclusion of the infringement count (18 U.S.C. §2319) could there be any possible allegation of the required two predicate acts.

Petitioner devotes almost two pages (Petition, pp. 8 and 9) to Wiener v. Napoli, 772 F.Supp., 109 (E.D.N.Y. 1991). Respondent's research on this case's pedigree indicates only two cites, Resolution Trust Corp. v. S & K Chevrolet, 868 F.Supp. 1047 (C.D. Illinois 1994) and the Sixth Circuit's opinion herein. Both properly point out its deficiencies, and decline to follow it.

CONCLUSION

Thus, Respondent, Ronald Snowden, submits that both the law and the facts support the Opinion of the United States Sixth Circuit Court of Appeals herein. Landgraf, supra is an exhaustive and well-reasoned opinion which appears to Respondent to be a comprehensive analysis of the principles to be applied in this and like matters, and the Sixth Circuit correctly applied them. Thus, this Court should deny this Petition.

Respectfully submitted this the 9th day of May, 2001.

Charles W. Curry

CHARLES W. CURRY

TKH\PLDGS\SNO510.BR3